

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Regulation of Prepaid Calling Card Services)	WC Docket No. 05-68
)	
)	

COMMENTS OF AMERICAN PUBLIC COMMUNICATIONS COUNCIL

Albert H. Kramer
Robert F. Aldrich
Jacob S. Farber
Dickstein Shapiro LLP
1825 I Street, N.W.
Washington, DC 20036
Tel. (202) 420-2290
Fax (202) 420-2201

*Attorneys for the American Public
Communications Council*

October 12, 2006

TABLE OF CONTENTS

Introduction and Summary	2
Discussion	3
I. The <i>Prepaid Card Order</i>	3
II. Compensation Is Required for All Calls Where the Prepaid Card Platform Provides Information and Thus the Call Is Completed at the Platform	5
III. Compensable Calls Include Calls Where the Platform Automatically Provides Account Information Including Account Balance	8
Conclusion	14

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Regulation of Prepaid Calling Card Services)	WC Docket No. 05-68
)	
)	

COMMENTS OF AMERICAN PUBLIC COMMUNICATIONS COUNCIL

The American Public Communications Council files these comments with respect to the Petition for Clarification or, in the Alternative, for Reconsideration of IDT Telecom, Inc. (the “Petition”) filed in the above-referenced docket on September 1, 2006.

In the Petition, IDT Telecom, Inc. (“IDT”) seeks reconsideration or clarification of footnote 101 of the June 30, 2006 *Prepaid Card Order*.¹ That footnote states in pertinent part that the Commission’s “rules require the payment of dial-around compensation to a payphone service provider when the cardholder completes a call to the platform without attempting to call a third party.”²

While the Petition addresses several aspects of footnote 101, IDT’s primary concern seems to be that the footnote does not contain a qualifier limiting its applicability to information service calls of the sort addressed by the *Prepaid Card Order*. The Commission should affirm that under its existing rules³ *any* call to a prepaid card calling

¹ *Regulation of Prepaid Calling Services*, Declaratory Ruling and Report and Order, WC Docket No. 05-68, FCC 06-79 (June 30, 2006).

² *Id.* ¶ 37 n.101.

³ While styled as a petition for clarification or, in the alternative, for reconsideration, as discussed below, there is no question but that the Petition asks the Commission to change an existing rule and to alter its ruling in the *Prepaid Card Order*. See text following this note. Accordingly, unless and until the Commission grants the

platform where information is dispensed by the platform is compensable, regardless of whether the call is a “telecommunications service” or an “information service” call.

INTRODUCTION AND SUMMARY

Before turning to the specifics of IDT’s Petition, it is important to place it in context. Today, flagrant violations of the Commission’s dial-around compensation rules are rampant in the prepaid calling card industry. There are literally hundreds of prepaid calling card providers who have not paid a single dollar of the compensation they owe to PSPs.⁴ And prepaid card providers have shown time and time again that they will seize on any alleged ambiguity in the Commission’s rules, no matter how absurd, to avoid paying the compensation they owe.⁵ It is against this backdrop that the Commission must consider the Petition.

If PSPs are ever going to have any hope of collecting the compensation to which they are entitled, the Commission must look to close potential loopholes wherever it can. The Petition, though, asks the Commission to do just the opposite. Under the current rule, prepaid card providers must pay compensation for all calls where the platform provides information and thus the call is completed at the platform. This straightforward rule is objective and is simple to administer.

relief requested by IDT, it and other prepaid calling card providers must continue to pay compensation for the calls for which IDT seeks reconsideration of the Commission’s rules, and should not be heard to complain later that there is an ambiguity in the ruling or rules.

⁴ IDT is not among them.

⁵ For example, one prepaid calling card provider has claimed that the completing carrier for its calls is not itself or its underlying SBR but whatever carrier happens to hand the call to the terminating LEC. See *APCC Services, Inc. v. Radiant*, File No. EB-05-MD-016. This is but one of the many absurd claims made by prepaid calling card providers to avoid paying the compensation they owe.

As discussed below, the rule change sought by IDT would allow prepaid calling providers to subjectively and unilaterally determine when compensation should be paid to a PSP. IDT seeks a rule under which prepaid card providers would only be required to compensate for a much narrower category of calls—“information service,” and then only when the caller intended to call the platform to obtain information and not to make a third party call. That question of intent would be impossible for the Commission and PSPs to resolve. If the Petition is granted, there is no question that it will open PSPs to further abuse and lead to even greater noncompliance by prepaid calling card providers.

DISCUSSION

I. *The Prepaid Card Order*

In the *Prepaid Card Order*, the Commission addressed the regulatory status of prepaid cards that, in addition to offering customers the option of making calls, also offer callers the ability to access information services through a menu.⁶ Prepaid card providers contended that, because of the information services component of menu-driven cards, they are information services instead of telecommunications services, and thus are not subject to access charges or universal service. The Commission rejected this argument, finding that such “menu-driven” prepaid cards are marketed, sold, and used primarily to make calls, and any information service component is incidental to the fundamental telecommunications service offering.⁷

⁶ The Commission also addressed the regulatory classification of prepaid calling cards that utilize IP transport. Like menu-driven cards that provide access to information services, the Commission found that prepaid calling cards utilizing IP transport are telecommunications services.

⁷ *Id.* ¶ 16.

In footnote 101, the Commission responded to APCC's request for clarification that payphone compensation is owed for any call completed to a calling card platform where the platform itself is the called party.⁸ The concern arose because under Section 276, payphone service providers are entitled to compensation for "each and every completed call." 47 U.S.C. § 276. The Commission has interpreted "completed" to mean calls answered by the called party.⁹ In the traditional prepaid calling card context—where the caller is using the calling services offered by the prepaid card vendor to dial a called party—this means that a call is not considered complete if it merely reaches the platform. Rather, it is completed after it reaches the platform, the caller enters account information and the called number and the call is routed to, and answered by, the called party.

The menu-drive prepaid cards addressed in the *Prepaid Card Order*, however, offer another possibility: that the card user calls the platform and, instead of making a call to some other called party, is provided with information by the prepaid platform. In this instance, when a caller calls the platform and information is provided, the platform *is* the

⁸ While APCC's request was prompted by the Commission's consideration of the menu-driven cards addressed by the *Prepaid Card Order*, nothing in that request or in its underlying logic—and nothing in the Commission's ruling or its underlying logic—is limited to only that subset of prepaid cards. Rather, footnote 101 applies to any prepaid calling card call where the platform itself is the called party and the call is thus compensable once it *is completed at the platform*, without regard to whether a call is made to a third party called party. For example, as discussed below, if a caller using a non-menu-driven prepaid card calls the platform and requests an operator in order to make a customer service inquiry, it is a compensable call. See p. 6 below.

⁹ IDT says in passing that it would be a violation of Section 276 for the Commission to require compensation for calls other than completed calls. See Petition at 2. While this is a tangential issue that the Commission need not reach here, IDT is not necessarily correct. The statute says that the Commission must provide compensation for "completed" calls. The Commission could very well do so by, for example, using a certain percentage of calls as a proxy for completed calls.

called party.¹⁰ Footnote 101 thus makes clear that under the Commission’s rules such calls are compensable once the platform is reached by the caller.

II. Compensation Is Required for All Calls Where the Prepaid Card Platform Provides Information and Thus the Call Is Completed at the Platform

At issue in IDT’s Petition is the scope of footnote 101. While IDT agrees that it is “a correct reading of footnote 101 that the Commission confirmed that payphone compensation is required for information service calls,” Petition 8, IDT is concerned that the language of footnote 101 could be interpreted to require compensation for uncompleted non-information service calls. In particular, IDT seeks a ruling that this language does not require the payment of compensation for calls “in which the called party reaches the platform and hangs up, failing to input all or part of a called party number (‘CPN’).” Petition at 1-2.

At the outset, it should be noted that IDT presents absolutely no quantification of the scope of the alleged problem that IDT is asking the Commission to address. IDT provides no data as to the number of calls at issue, saying only that calls to prepaid card platforms where no PIN is entered “do not constitute the majority of all prepaid card calls.” Petition at 6. And IDT says nothing about the presumably much smaller number of calls where a caller reaches the platform, enters a PIN, but then does not complete a call to a third party. The lack of this data—which is uniquely in IDT’s possession¹¹—makes it impossible to assess to what extent IDT’s concerns are wholly theoretical, and

¹⁰ IDT’s Petition frames the issue in terms of seeking clarification or reconsideration regarding “information service” calls to prepaid calling card calls. Those calls, however, are actually only a subset of the broader category of calls where a caller is provided with information by or at the platform (e.g. by a live operator), rendering the platform the called party and the call compensable. *See* pp. 5-7 below.

¹¹ PSPs have no direct way of knowing if a call is routed to IDT’s platform, and have absolutely no way of knowing what happens to the call after it reaches the platform.

IDT's failure to provide the data is an independent reason why the Petition should be denied.

The fundamental problem with IDT's request is that it is framed in terms of "information service" calls to prepaid card platforms. IDT confuses *information service* calls to prepaid card platforms with calls to prepaid card where *information is dispensed*. As discussed below, it is that broader category of calls—calls where the platform dispenses information—that the Commission was addressing in footnote 101.

Indeed, the categorization of a call as an information service or a telecommunications service is irrelevant to the issue of whether the call is compensable under Section 276. In determining whether PSPs are entitled to compensation for payphone calls, the only relevant inquiry is whether the call was "completed . . . using their payphone."¹²

Footnote 101 thus properly makes clear that *any* payphone call to a prepaid card platform where the platform provides information to the caller is a completed, and therefore compensable, call. While this includes calls that in other contexts could be deemed information services such as menu-driven weather information, footnote 101 is not limited to such calls. Consider for example the possibility of a caller calling a prepaid card platform, requesting a live operator and then obtaining information from that operator, be it weather, or restaurant or entertainment information. Such a call would certainly *not* constitute an "information services" call. The caller is interacting with a live operator, not with stored information. There is no question, however, that such a call

¹² 47 U.S.C. § 276(b)(1)(A).

would be compensable. The called party that the caller set out to reach was the platform and the call was completed to that called party.¹³

Thus, while IDT is correct that if a payphone caller dials a prepaid card provider's platform, and uses the platform to access information services, then the call is compensable,¹⁴ it is wrong that *only* information services calls to prepaid card platforms are compensable. Any call where the platform is the called party is compensable. Those calls include calls to the platform for customer service (e.g. to contest a bill or to seek dialing instructions), to add money to a card, and, as discussed in Section III below, calls where account information is provided.

To be clear, since compensation is required only when a call is completed to the called party, APCC agrees with IDT that no compensation is due where a caller calls a prepaid card platform number in order to make a call to a separate called party and hangs

¹³ Inexplicably, IDT says in passing that “for purposes of determining payphone compensation, a prepaid calling card platform is not a ‘called party’ and, therefore, communications that reach a platform are not completed calls under section 276 of the Act” Petition at 7. IDT thus assumes the answer to the question it is asking, even though that view is obviously directly contradicted by footnote 101. As IDT agrees, at least with respect to “information service” calls, footnote 101 makes clear that compensation is required for completed calls to prepaid calling platforms. It necessarily follows that the platform is the called party.

In any case, the order cited by IDT, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Order on Reconsideration, 16 FCC Rcd 20922 (2001), is completely off point. In that order, the Commission addressed petitions for reconsideration from AT&T and MCI seeking a ruling that all calls handed off by an underlying facilities-based IXC to an SBR's switch could be considered completed by the underlying facilities-based IXC. (At the time, the Commission required the first facilities-based IXC to pay compensation for calls handed off to SBRs.) The Commission disagreed, saying that underlying facilities-based IXCs can only treat as completed calls directed to a SBR's switch and then answered by the called party. The Commission reasoned, correctly, only calls answered by the called party are “completed” as the Commission has interpreted the statute. *See id.* ¶¶ 8-9. This hurts IDT more than it helps. As discussed above, for the calls addressed by footnote 101, the platform itself *is* the called party.

¹⁴ *See* Petition at 5.

up before entering a PIN. *See* Petition at 8-9. In such an instance, no call is or could be completed to a called third party, and the platform has not provided any information to the caller so the call is not considered completed at the platform.¹⁵

APCC further agrees with IDT that if a PIN is entered, but no information is provided, and a caller does not complete the process of entering a called party number, then no compensation is due. *See id.* APCC agrees that this is true regardless of whether (1) the caller enters a called number but the called party does not answer or (2) the caller abandons the call before completing the process of entering a called number. IDT is certainly correct that callers might abandon calls for “various reasons, such as, confusion, distraction, indecision, etc.” Petition at 6. No matter the reason, such abandoned calls where no information is provided by or at the platform are not answered by the called party, and thus are not completed within the meaning of Section 276.

III. Compensable Calls Include Calls Where the Platform Automatically Provides Account Information Including Account Balance

Contrary to IDT’s view, calls to the platform as called party include calls where account information is provided to the caller by or at the platform. In one typical scenario, the caller calls the platform, enters account information and then either follows a menu to request information about his or her account or is automatically provided with that information upon entering an account number. According to IDT, these calls, where the information dispensed is information relating to the caller’s account, should be excluded from compensation.¹⁶

¹⁵ Since no compensation is due for calls where no PIN is entered, IDT’s concern about fraud in the form of “non-cardholders” calling the platform and hanging up without entering a PIN in order to generate payphone compensation, *see* Petition at 9, is moot.

¹⁶ *See* Petition at 5 n.12.

Such calls, however, are no different from any other kind of customer service call. IDT would surely not contest that when a airline frequent flyer program member calls the airline, gets a live customer service representative, and then ask for his or her mileage balance, the call is compensable. And IDT would surely not contest that the call would be equally compensable if the frequent flyer member received the sought information through a menu or IVR system, instead of through a live customer service representative.

The same is true for calls to IDT's platform. If a caller calls the platform, and any customer service is provided, including account information, then the IDT platform is the called party, and the call is compensable once it is answered at the platform. Just as it does not matter for calls to third party customer service numbers whether the information is provided by a customer service representative or by a computer, it is irrelevant whether a customer service call to IDT's platform involves a live operator.

Yet IDT contends that if a caller calls its platform, is provided with balance information—completing a call to the platform—but then does not call a third party, the call is not compensable. According to IDT, “the provision of such information in that situation is merely incidental to the processing of a telephone call to a third party and not a separate, completed information service call for which compensation is required.”¹⁷

IDT is simply wrong. As discussed above, it is irrelevant whether a call where information is provided by or at the platform is an “information service call.” The only relevant question is whether the call is completed—i.e. answered by the called party.¹⁸

¹⁷ *Id.*

¹⁸ Because it is irrelevant for payphone compensation purposes whether a call to a prepaid card platform is an information service, IDT's citation to then-Common Carrier Bureau's 1995 decision in *The Time Machine, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 1186, misses the mark. That case, which predated Section 276 and had nothing

Since information was provided by the platform, the platform *is* the called party, and the call is compensable.

Take the related example of a call where a prepaid card user called the platform, asked for a live operator, and requested balance information. IDT would not dispute that the call would be compensable.¹⁹ And, having said that “information service” calls to a platform are compensable,²⁰ IDT would presumably agree that if a prepaid card users calls a platform, and uses a menu or an IVR system and requests account information, the call is compensable. IDT, however, would deny compensation to PSPs where account information is provided to the caller automatically. There is simply no basis for this distinction. In all three scenarios, the same information is provided to the caller, and since the platform provided information, rendering it the called party, the call is compensable. Compensation should not and does not turn on *how* the information is provided. If a prepaid card user calls the platform and receives balance information, the user has used a payphone to complete a call, and the PSP is entitled to compensation for the use of the payphone.

to do with payphone compensation, denied a request for declaratory ruling that prepaid calling cards are a wholly interstate service offering and that their regulation by the states is preempted. In the paragraph cited by IDT, the Bureau rejected the side argument raised by a commenter that prepaid calling cards are an “enhanced [service; i.e. an information service] because information on the amount of time remaining on the card is maintained by a computer.” *Id.* ¶ 40. In other words, the Bureau’s holding was that the maintenance of account balance information is not sufficient to transform the entire prepaid calling card service into an enhanced service. *Id.* The case did not address the question at issue here: whether the provision of customer account information is an exception to the rule that calls to prepaid card platforms where the platform dispenses information (and is thus the called party) are compensable. It is also worth noting that the case addressed only the maintenance and updating of account information by computer; it did not address the provision of that information to the end user caller. *Id.*

¹⁹ See Petition at 6-7 (agreeing that a “completed call is a call that is answered by the called party”) (internal quotations and citations omitted).

²⁰ See Petition at 5.

Moreover, if the Commission were to revise its rules to exclude from compensation calls where a prepaid platform provides account information automatically, it would open a Pandora's box of subjective interpretations of the caller's intent. Prepaid card providers and PSPs would be drawn into debates over whether the caller intended make a call to a third party and incidentally received information or intended to call the platform to receive information.²¹ The only way to avoid confusion over what kind of information can be provided without rendering a call compensable is to retain the bright line rule that a call to a prepaid card platform is considered completed to the platform—and therefore compensable—if the platform provides any information to the caller, automatically or otherwise.

IDT argues that such a result would be anti-consumer because IDT would be required to assess a payphone surcharge on calls where a card user receives balance information but then does not make a call to a third party. According to IDT, this would result in prepaid card users having their cards unfairly depleted. *See* Petition at 10. IDT, however, ignores the reality that it has the flexibility to respond to the marketplace and that PSPs lack that ability.

The simple fact is that IDT has the freedom to structure its offering any way it chooses. Among other things, it has the discretion to decide whether or not to provide callers with automatic balance information. If IDT does not want to pay compensation on calls where it automatically provides account balance information, it can structure its calling card products so that information is not provided automatically. IDT could, for

²¹ As noted above, IDT expresses concern over fraud by PSPs under the current rules. *See* n. 15. Under its proposed revision, however, there would almost certainly be several orders of magnitude more fraud *against* PSPs.

example, only provide account balance information if it is affirmatively requested by the card user.

And of course, even if IDT chooses to continue to automatically provide account information, there is nothing that obligates IDT to assess a surcharge on calling card users in every instance in which IDT is obligated to pay compensation to PSPs. As the Commission has made clear, carriers are free to adopt the marketplace solution of their choosing for addressing the costs of dial-around compensation.²² In particular, the Commission has held that “[i]ndividual carriers, while obligated to pay a specified per-call rate to PSPs, have the option of recovering . . . a different amount from their customers, including no amount at all.”²³ Thus, while IDT is free to pass-through compensation charges to end-users, it is not obligated to do so, and it has other options available to it. IDT could, for example, choose not to surcharge prepaid card users for those calls where account information is provided but the caller does not make a call or obtain other information. Another option would be for IDT to increase its rates by whatever amount would be necessary to recover the costs of paying compensation on the calls in question.²⁴

²² See, e.g. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541, ¶ 83 (1996) (“Although some commenters would have the Commission limit the ways in which carriers could recover the cost of per-call compensation, we conclude that the marketplace will determine, over time, the appropriate options for recovering these costs.”) (internal citations omitted).

²³ *Id.* (internal citations omitted).

²⁴ While it is presumably a very small amount, it is impossible to know by how much IDT would have to increase its rates because, as discussed above, IDT provides no data as to the number of calls at issue. Regardless, however, of the specific amount, the point remains that it is a business decision within IDT’s discretion one way or the other.

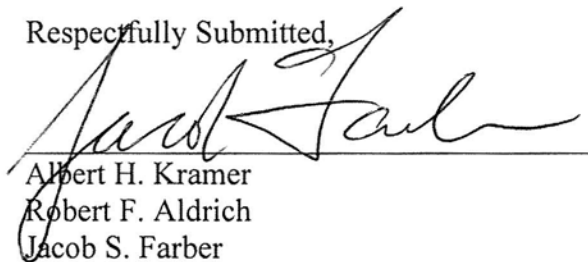
By contrast, unlike IDT and other prepaid card providers, PSPs have absolutely no ability to respond in the market. PSPs are prohibited from blocking calls and thus have no effective tool for responding to prepaid card holders who fail to honor their compensation obligations.

Given the already rampant noncompliance in the prepaid calling card industry, the Commission should not open the door to any further abuses of its payphone compensation rules. It should affirm that PSPs are entitled to compensation for calls to a prepaid card platform where the caller enters his or her PIN and receives information, including balance or other account information, regardless of whether a call is then made to a third party.

CONCLUSION

For the reasons shown above, the Commission should deny IDT's Petition and affirm that compensation is required for all calls where a prepaid card platform provides information and thus the call is completed at the platform, including without limitation those calls where the prepaid card platform automatically provides balance or other account information.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jacob S. Farber", is written over a horizontal line.

Albert H. Kramer

Robert F. Aldrich

Jacob S. Farber

Dickstein Shapiro LLP

1825 I Street, N.W.

Washington, DC 20036

Tel. (202) 420-2290

Fax (202) 420-2201

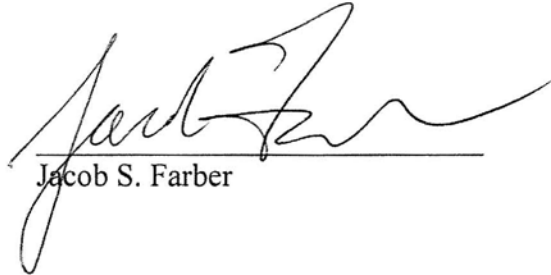
*Attorneys for the American Public Communications
Council*

Dated: October 12, 2006

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2006, I caused a copy of the foregoing Comments of American Public Communications Council to be served by e-mail and U.S. mail to the following:

Kathleen Greenan Ramsey
Wendy M. Creeden
SONNENSCHN NATH & ROSENTHAL LLP
1301 K Street, N.W.
Suite 600, East Tower
Washington, DC 20005
kramsey@sonnenschein.com
wcreeden@sonnenschein.com



Jacob S. Farber